

HOLD HARMLESS PROVISIONS *and* **INSURANCE SPECIFICATIONS** *in Contracts*



Revised December 1, 2012

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	ii
CONTRACTUAL RISK TRANSFER	1
A. What is a Contract?	1
B. Contract Risk Transfer	1
C. Contractual Transfer Concerns?	1
D. How is Risk Transferred?	2
DEVELOPING CONTRACTS	2
A. Hold Harmless and Indemnification Clauses	2
B. Examine Carefully	3
CONTRACTOR INSURANCE	4
A. Additional Insured Provisions	6
B. Certificates of Insurance	6
C. Policing Certificates	6
DETERMINING APPROPRIATE INSURANCE REQUIREMENTS	7
A. Determining Appropriate Insurance Requirements	7
B. Evaluating Risk and Determining Insurance Limits	8
SAMPLE SPECIFICATIONS FOR STATE CONTRACTS	9
APPENDICES	13
A. Glossary	14
B. Sample Contract	15

CONTRACTUAL RISK TRANSFER

What Is A Contract?

A contract is an agreement between two or more parties which creates an obligation to do or not to do a particular thing. The document containing such an agreement is usually in writing, although a contract can be oral.

Contractual risk transfer is the process by which an organization assigns risk to independent contractors that it chooses to do business with. The guidelines in this document address hold harmless provisions and insurance provisions in contracts as a way to transfer risk and protect the state from tort liability. These guidelines are not a substitute for sound legal advice.

The Risk Management & Tort Defense Division recommends that each agency establish a process by which contracts are reviewed and approved by an attorney or someone else who understands contracts and is familiar with the information provided in this document.

Contractual Risk Transfer

Contractual risk transfer is a method of allocating risk to independent contractors through hold harmless provisions and insurance specifications.

The question is often asked, why transfer contractual risk, why doesn't the state just assume it? A few of the more important reasons are summarized below:

1. The state is self-insured. Liability may fall upon the owner of a contract (i.e.state) absent appropriate language.
2. The potential loss stemming from performance of many contracts is too large for the state to assume.
3. The contractor is in a better position to assimilate the loss because of:
 - Experience.
 - Financial capacity.
 - Ability to control the work.

Contractual Transfer Concerns

There are a number of potential concerns which may arise with respect to contracts or contractor insurance unless appropriate indemnity provisions and insurance specifications are established:

- Contractor purchases the wrong type of insurance.
- Contractor provides insurance which is excess of any other insurance, including the state's insurance.
- Contractor purchases claims made insurance coverage versus occurrence coverage.

- Contractor fails to specifically name the state as an additional insured under its insurance policy.
- Contractor's insurance lapses and the contractor is rendered insolvent.
- Contractor's employees are injured and have no insurance.
- Inadequate contractor insurance limits. If the contractor has an aggregate insurance policy limit and prior losses, the state may not be protected in the event of contractor negligence.
- Insurance policy exclusions.
- Contractor failure/insolvency.
- Contractor's insurance company becomes insolvent.

Most of these concerns are avoided through appropriate contract language and are addressed in subsequent sections.

How is Risk Transferred?

Risk transfer can usually be accomplished in two ways. These methods are not mutually exclusive. Successful risk transfer includes a combination of both:

- Carefully worded hold harmless and indemnification language.
- Contractual requirements for the contractor to purchase insurance. Appropriate insurance coverage becomes especially important when the contractor has agreed to hold harmless, defend, and indemnify the state.

DEVELOPING CONTRACTS

This section provides a framework for developing contractual agreements. Agency contracts may differ substantially based upon type of contract, industry standards, or specific federal or state regulations.

For those agencies that do not have access to legal counsel, a sample contract may be found in the appendices on page 15.

Hold Harmless/Indemnification Clauses

A hold harmless/indemnification clause in a contract is a transfer mechanism where the contractor agrees to assume, by contract, the liability associated with the work performed or services provided.

Hold harmless/ indemnification agreements differ considerably in the way that they are worded and to the extent that they transfer liability. To be valid, a hold harmless/indemnification clause must be specific.

Hold harmless/indemnification agreements should have appropriate contract language and require the contractor to defend (pay legal costs) and indemnify (pay settlements or judgments) for activities of the

contractor associated with performance of the contract.

Hold harmless/indemnification agreements are useful to clarify and pinpoint accountability. Their value without insurance or other secured financial transfer devices may be limited.

The type of hold harmless/indemnification clause obtained by each state agency will depend on negotiating abilities, skill in writing contracts, and the bargaining position of the parties.

A brief explanation of the various types of hold harmless/indemnification agreements is provided below: For sample language, please see the section entitled 'Sample Specifications', Page 9.

- **Limited Form** - Requires the contractor to be responsible for his/her own negligence.

Under a limited form hold harmless/indemnification agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for liability arising out of the negligent acts or activities of the contractor.

- **Intermediate Form** - Requires the contractor to be responsible for his/her own negligence or the joint negligence of the contractor and the state.

Under an intermediate form agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for all liability arising out of the project, except that arising out of the sole negligence of the agency.

- **Broad Form** - Requires the contractor to be responsible for all liability arising out of the project (including the sole negligence of the agency).

Under a broad form agreement, the contractor agrees to hold harmless, defend, and indemnify the agency for all liability arising out of the project.

The clause does not guarantee the following:

- That the contract itself is good, or that the courts will enforce the clause if it is against public policy.
- That the party who assumes the liability will be financially able to pay damages or respond.
- That the insurer of the assuming party will cover loss due to exclusions under the contractual liability coverage.

Examine Carefully

- The sole negligence of the contractor and the joint negligence of the contractor and the agency.
- All liability arising out of the project, not just bodily injury and property damage.
- Damages or injury to:
 1. Contractor's employees and agents.
 2. Contractor's property.

3. Third parties.

Hold harmless/indemnification language, in and of itself, is usually insufficient to protect the state in the event of a loss for the following reasons:

- ◆ Where the state and the contractor have both signed hold harmless/indemnification agreements or liability is in question, the courts may turn to the contractor's/contractee's insurance policies for recovery.
- ◆ In the event of a large loss, the contractor may become insolvent and in the absence of insurance, the courts may look to the state for recovery.

When transferring risk through the use of a hold harmless/indemnification clause, there are a number of points to discuss thoroughly before executing the contract. The major points are:

- Clearly delineate each party's obligations.
- Make certain that the other party has the financial ability to assume the liability, either through their own resources, or through insurance to back their commitment.

A hold harmless/indemnification agreement does not excuse the state from liability. The agreement simply provides a contractual right to pursue recovery from the other party assuming the liability.

CONTRACTOR INSURANCE

In addition to hold harmless/indemnification language, insurance is a vital mechanism whereby risk is transferred from the state to the contractor's insurer by requiring the contractor to purchase insurance coverage.

Insurance becomes especially important when the contractor has agreed to defend and indemnify the state. We have outlined on the next page some of the basic types of insurance that agencies should typically require of a contractor by contract type. **Note: state agencies and universities perform many activities and provide many services that may necessitate other types of contractual insurance not found on page 5. Please contact the Risk Management & Tort Defense Division if you need assistance.**

INSURANCE COVERAGE BY CONTRACT TYPE

Type of Contract	General Liability	Vehicle Liability	Professional Liability	Fire & Extended Coverage or All Risk	Workers' Compensation Coverage
Construction Contracts	✓	*	✓	✓	✓
General Services Contracts (e.g. housekeeping, maintenance, etc.)	✓	*			✓
Lease (tenant of entire building or ground lease with building reverting to agency)	✓			✓	✓
Traditional professional service contracts (i.e. architects, accountants, engineers, doctors, lawyers, Medical, etc.)	✓	*	✓		✓
Other professional service contracts (i.e. non-traditional etc.)	✓	*	*		✓
Transportation contracts or contracts that require substantial use of an automobile.	*	✓			✓

* Optional – where there is an exposure or risk that would warrant insurance.

✓ Usually required.

Where insurance is required of a contractor, it is important that agencies: 1) require the contractor to name the state as an additional insured where feasible; 2) obtain certificates of insurance - proof of contractor's insurance coverage; 3) specify via insurance/bid requirements what type of coverage is required given the risk; and 4) obtain

written copies of the endorsement and/or certificates of insurance from the contractor and/or its insurer prior to provision of a service and/or procurement of a product.

Additional Insured Provisions

Typically, the named insured in an insurance contract is the independent contractor.

An additional insured is a person or organization, other than the named insured, which is protected under the terms of the contract (i.e. the state).

State agencies should require each contractor to name the state as an additional insured, where feasible, in the contractor's certificates of insurance and under the contractor's insurance policy via endorsement to the policy.

The most common reasons for requiring the contractor to name the state as an additional insured are listed below:

- ✦ The contractor's obligations are not dismissed due to bankruptcy.
- ✦ Coverage is provided for the state's defense expenses and other claims costs.
- ✦ The insurer may not subrogate claims against the state.
- ✦ The contractual liability insurance affords a degree of indirect financial security to the state (i.e. there is another entity, the insurer, to whom the state can go for coverage of claims and related expenses mentioned in the hold harmless agreement.)
- ✦ Being an additional insured is not a substitute for a hold harmless agreement because it protects only against perils covered in the insurance policy. Both are needed in the agreement for financial insured considerations.

How do state agencies request to be named as an additional insured under the contractor's policy? When executing bid specifications, under insurance coverage's required, request to be named as an additional insured (see sample specifications page 9).

Certificates of Insurance

As previously stated, one-way to ensure compliance of the hold harmless clause is the financial strength of the party to whom the risk is transferred. This can be done by asking for a certificate of insurance.

The certificate of insurance provides evidence of contractor insurance and should indicate the type of coverage, limits of liability, and term of insurance. A certificate should be signed by an authorized agent of the insurer or an officer of the insurance company.

A certificate of insurance is not a contract--only evidence of coverage at the time the certificate is issued. Having a certificate is no guarantee that the policy is currently in force or that coverage is as requested.

In addition to certificates of insurance, state agencies should require and obtain copies of the appropriate endorsements or policy language prior to the provision of the service or procurement of the product.

Policing Certificates

The certificates of insurance supplied by many companies and insurers are not adequate. Following is a checklist of what a certificate should contain:

- * Limits of liability requested in the specifications.
- * A clear description of the general nature of the coverage and the extension endorsements (i.e. general liability, automobile liability, worker's compensation, employer's liability etc.).
- * A statement that the policy will stay in force and that no material change will take place to the policy without prior written notification.
- * A statement that the state is named as an additional insured.

DETERMINING APPROPRIATE INSURANCE REQUIREMENTS

In an effort to allow greater flexibility in establishing appropriate insurance requirements, the Risk Management & Tort Defense Division has developed the following guidelines in selecting insurance requirements for bids and proposals.

STEP ONE: Determine what type of insurance should be required.

There are primarily five separate types of insurance requirements that agencies should evaluate to fit specific insurance needs; General Liability, Automobile Liability, Professional Liability, Workers' Compensation, and Property. For contracts with insurance requirements that fall outside of these insurance requirements, please contact the Risk Management & Tort Defense Division.

For contracts that fall under the purview of the Montana Procurement Act, agencies should work with the State Procurement Bureau or agency legal counsel to determine which insurance types should be included in the solicitation document for all bids and proposals. The State Procurement Bureau will contact the Risk Management and Tort Defense Division (RMTD) if questions arise about coverages, endorsements, and/or certificates of insurance.

For all other proposals agencies should work with legal counsel and the Risk Management & Tort Defense Division directly. The five types of insurance are:

- **Commercial General Liability Insurance:** should be required when contractors perform work on state premises or property, other than the routine delivery of supplies. This coverage should also be required where bodily injury or property damage may occur as a result of the service being provided and in most traditional (i.e. accountants, architects, engineers, doctors, lawyers, etc.) professional liability contracts.
- **Commercial Automobile Liability Insurance:** should be required if the contractor will be transporting state employees, state guests, state clients, or state products as part of the contract.
- **Professional Liability Insurance:** should be required in most traditional professional liability contracts (i.e. accountants, architects, doctors, engineers, lawyers, etc.) and in all other professional liability contracts where errors and omissions may result in significant economic damages for anyone who gives advice or provides services on which others have reason to rely and may be subject to legal action if the advice or service proves faulty.
- **Property Insurance:** should be required in any contract that involves renovation or construction of state buildings.

- **Workers' Compensation insurance or an exemption:** should be required in all contracts.

STEP TWO: Evaluating risk and determining insurance limits.

The Risk Management and Tort Defense Division recommends that state contracts require minimum limits of \$1,000,000 per occurrence /\$2,000,000 per aggregate since these limits most closely coincide with the state's tort damage caps.

However, RMTD recognizes that the state enters into contracts in which these standard levels of coverage may be excessive or inadequate. The size of the contract in and of itself should not determine coverage limits. Rather, the risk associated with the product or service provided under contract should govern the limits of insurance that are required. RMTD has developed the following table as an aid in determining appropriate insurance requirements for various risk levels.

TYPE OF INSURANCE	LEVEL OF RISK		
	Low	Moderate (combined single limits, except for auto)	High
General Liability	\$300,000 per occurrence	\$500,000 per occurrence	\$1,000,000 per occurrence
	\$600,000 aggregate	\$1,000,000 aggregate	\$2,000,000 aggregate
Auto	Split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage); OR Combined single limits of \$1,000,000 per occurrence to cover to cover such claims as may be caused by any act, omission, or negligence of the Contractor or its officers, agents, representatives, assigns or subcontractors.		
Professional Liability	\$300,000 per occurrence	\$500,000 per occurrence	\$1,000,000 occurrence
	\$600,000 aggregate	\$1,000,000 aggregate	\$2,000,000 aggregate
Property	Replacement Cost	Replacement Cost	Replacement Cost
Workers' Compensation	Statutorily Defined	" "	" "

Note: the level of risk may vary within the same contract if more than one type of insurance is required. The insurance limits stated in these specifications are recommended minimums and may need to be increased or reduced to reflect the risk associated with performance of the contract.

SAMPLE SPECIFICATIONS FOR STATE CONTRACTS

Common Provisions

(Please incorporate these into the RFP first, then the bid document, then the contract in the order in which they appear.)

I. Hold Harmless and Indemnification Clauses

The contractor shall protect, defend, and save the state, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by third parties on account of damage to property, personal injury, or death which injury, death, or damage, arises out of services performed or omissions of services or in any way results from the negligent acts or omissions of the contractor, its agents, or subcontractors, except the sole negligence of the state.

II. Insurance

Contractor shall maintain for the duration of the contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by the contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

Note: Since contractual liability is not covered in certain professional liability contracts, at the discretion of the agency, the terms contractual liability and contractor as denoted above may need to be deleted from certain professional liability contracts.

III. Primary Insurance

The contractor's insurance coverage shall be primary insurance as respect to the state, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the state, its officers, officials, employees or volunteers shall be excess of the contractor's insurance and shall not contribute with it.

IV. Insurance requirements

Insert the appropriate insurance requirement below based upon the type of contract. See Page 5 for an explanation of insurance by type of contract. Limits will depend upon the risk associated with performance of the contract, Page 6. **Note: state agencies and universities perform many activities and provided many services that may necessitate other types of contractual insurance not found below. Please contact the Risk Management & Tort Defense Division if you need assistance.**

(Insert for commercial general liability only)

Specific Requirements for Commercial General Liability: The contractor shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of \$1,000,000 per occurrence and \$2 million aggregate per year (limits may be lower or higher depending on the risk see page 5) to cover such claims as may be caused by any act, omission, or negligence of the entity's officers, agents, representatives, assigns or subcontractors. Note: The limits for political subdivisions of the state (i.e.

counties, cities, towns, and school districts) are prescribed under §2-9-211, MCA at \$750,000 per claim and \$1,500,000 per occurrence and may not be increased.

Additional Insured Status: The State, its officers, officials, employees, and volunteers are to be covered as additional insureds; for liability arising out of activities performed by or on behalf of the contractor, including the state's general supervision of the contractor; products and completed operations; and premises owned, leased, occupied, or used.

(Insert for automobile liability only)

Specific Requirements for Automobile Liability: The Contractor shall purchase and maintain occurrence coverage with split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage), OR combined single limits of \$1,000,000 per occurrence (limits may be lower or higher depending on the risk see page 10) to cover such claims as may be caused by any act, omission, or negligence of the contractor's officers, agents, representatives, assigns or subcontractors. Note: The limits for political subdivisions of the state (i.e. counties, cities, towns, and school districts) are prescribed under §2-9-211, MCA at \$750,000 per claim and \$1,500,000 per occurrence and may not be increased.

Additional Insured Status: The State, its officers, officials, employees, and volunteers are to be covered as additional insured's for automobiles owned, leased, hired, or borrowed by the contractor.

(Insert for professional liability only)

Specific Requirements for Professional Liability: The contractor shall purchase and maintain occurrence coverage with combined single limits for each wrongful act of _____ per occurrence and _____ aggregate per year (see page 10 for assistance in determining limits) to cover such claims as may be caused by any act, omission, or negligence of the contractor's officers, agents, representatives, assigns or subcontractors. Note: The limits for political subdivisions of the state (i.e. counties, cities, towns, and school districts) are prescribed under §2-9-211, MCA at \$750,000 per claim and \$1,500,000 per occurrence and may not be increased. Note: If occurrence coverage is unavailable or cost-prohibitive, the state will accept 'claims made' coverage provided the following conditions are met: 1) the commencement date of the contract must not fall outside the effective date of insurance coverage and it will be the retroactive date for insurance coverage in future years. 2) The claims made policy must have a three-year tail for claims that are made (filed) after the cancellation or expiration date of the policy.

(Insert for crime insurance only where contractors are handling significant amounts of cash, checks, securities, bonds, or other financial instruments)

Specific Requirements for Crime Insurance: The contractor shall purchase and maintain crime insurance which shall cover burglary/theft, fraud/embezzlement, and forgery/alteration of monetary instruments in the amount of \$1,000,000 per occurrence and \$2,000,000 aggregate that provides coverage for fraud, theft, embezzlement, failure to faithfully perform duties, **burglary and theft of cash by employees or third parties other than employees, forgery/alteration, computer fraud**, and other dishonest acts of any employee, **agent, or independent contractor** whose duties are to receive, handle, or have custody of money, checks, securities, electronic funds, or account for supplies or other property. The bond must apply to any individual that certifies, signs, or countersigns checks, drafts, warrants, vouchers, orders, electronic documents, or other documents and who provides for the disbursement or delivery (including electronic transmission) of money, funds, securities, supplies, or other property. The fidelity bond must remain in effect for the entire contract period.

(Insert for workers' compensation insurance only)

Contractors are required to maintain workers' compensation insurance or an independent contractor's exemption

covering the contractor and/or employees while performing work for the State of Montana in accordance with §39-71-120/401/405, Montana Code Annotated. Neither the contractor nor its employees are employees of the state. This insurance/exemption must be valid for the entire contract period.

(Insert for property insurance only new structures only)

At its sole cost and expense, the contractor shall keep the building and all other improvements on the premises insured throughout the term of the agreement against the following hazards:

- Loss or damage by fire and such other risks (including earthquake damage for those areas with a shaking level at 10g or above as indicated on the seismic map, <http://rmtd.mt.gov/aboutus/publications/files/NEHRP.pdf>) in an amount sufficient to permit such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire insurance policies.
- Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises.
- Loss or damage by explosion of steam boilers, pressure vessels, and oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises.

(Insert for property insurance only with existing structures for renovations)

- The contractor shall purchase and maintain Builder's Risk/Installation insurance on a "special causes of loss" form (so called "all risk") for the cost of the work and any subsequent modifications and change orders. The contractor is not responsible for insuring the existing structure for Builder's Risk/Installation insurance.
- At its sole cost and expense, the contractor shall insure all property construction on the premises throughout the term of the agreement against the following hazards:
 - a. Loss or damage by fire and such other risks (including earthquake damage for those areas with a shaking level at 10g or above as indicated on the seismic map at <http://rmtd.mt.gov/aboutus/publications/files/NEHRP.pdf>) in an amount sufficient to permit such insurance to be written at all times on a replacement cost basis. This may be insured against by attachment of standard form extended coverage endorsement to fire policies.
 - b. Loss or damage from leakage or sprinkler systems now or hereafter installed in any building on the premises.
 - c. Loss or damage by explosion of steam boilers, pressure vessels, oil or gasoline storage tanks, or similar apparatus now or hereafter installed in a building or buildings on the premises.

V. Deductibles and Self-Insured Retentions

Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency, either: 1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the state, its officers, employees, or volunteer; or 2) at its own expense, the contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses. Note: The deductible/self-insured provision does not apply to political subdivisions of the state (i.e. counties, cities, towns, and school districts) under §2-9-211, MCA.

VI. Certificates of Insurance

Insurance is to be placed with an insurer with a Best's rating of no less than A-. Note: Best's ratings do not apply to political subdivisions of the state (i.e. counties, cities, towns, and school districts) under §2-9-211, MCA. All certificates and endorsements are to be received by the state prior to the provision of a service or purchase of a product. The Contractor must notify the State immediately, of any material change in insurance coverage, such as changes in limits, coverages, change in status of policy, etc. The state reserves the right to require complete copies of insurance policies or self-insured memorandums of coverage at all times.

APPENDICES

GLOSSARY

ADDITIONAL INSURED - A person other than the named insured who is protected under the terms of the contract. Usually, additional insured's are added by endorsement or referred to in the wording of the definition of "insured" in the policy itself.

AGGREGATE LIMIT - Usually refers to liability insurance and indicates the amount of coverage that the insured has under the contract for a specific period of time, usually the contract period, no matter how many separate accidents may occur.

BODILY INJURY LIABILITY - A legal liability that may arise as a result of the injury or death of another person.

BROAD FORM PROPERTY DAMAGE - An endorsement to a general liability policy that deletes the exclusion referring to property in the care, custody, or control of the insured and replaces it with a less restrictive exclusion.

CLAIMS-MADE COVERAGE - A policy written on this basis covers only those claims, which occur during the policy period and are reported during the policy period; however, when the insured renews the claims made form, coverage for prior acts is provided back to the retroactive date (the effective date of the original claims made policy with the same insurer).

CERTIFICATE OF INSURANCE - A form, which verifies that a policy has been written and states the coverage in general, often used as proof of insurance in loan transactions and for other legal requirements.

COMBINED SINGLE LIMIT - A single limit of protection for both bodily injury and/or property damage, contrasted with split limits, where specific limits apply to bodily injury or property damage separately.

COMPREHENSIVE GENERAL LIABILITY POLICY - This policy covers the insured against liability for all general liability exposures, unless excluded by the policy. Examples of exposures covered are premises and operations, products and completed operations, independent contractors, and designated contractors.

HOLD HARMLESS AGREEMENT - A contractual arrangement whereby one party assumes the liability inherent in a situation thereby is relieving the other party of responsibility.

INSURED - The party to an insurance arrangement whom the insurer agrees to indemnify for losses, provide benefits for, or render services to.

LIMITS OF LIABILITY - The maximum amount for which an insurer is liable as set forth in the contract.

NAMED INSURED - The party whose name appears on the face of the insurance policy.

OCCURRENCE COVERAGE - A liability provision which specifies that coverage applies to all injuries arising out of occurrences during the policy period regardless of when the claim is made.

REPLACEMENT COST - The price of purchasing or constructing a new item of property to replace an older, used item of property.

Sample Contract
(INSERT PROJECT TITLE)
(INSERT CONTRACT NUMBER)

THIS CONTRACT is entered into by and between the State of Montana **(insert agency name)**, (State), whose address and phone number are **(insert address)**, **(insert phone number)** and **(insert name of contractor)**, (Contractor), whose address and phone number are **(insert address)** and **(insert phone number)**.

1. EFFECTIVE DATE, DURATION, AND RENEWAL

1.1 Contract Term. The contract's initial term is **(insert date)**, 20**()**, **(or upon contract execution)**, through **(insert date)**, 20**()**, unless terminated earlier as provided in this contract. In no event is this contract binding on the State unless the State's authorized representative has signed it. The legal counsel signature approving legal content of the contract and the procurement officer signature approving the form of the contract do not constitute an authorized signature.

1.2 Contract Renewal. The State may renew this contract under its then-existing terms and conditions (subject to potential cost adjustments described below in section 2) in **(insert number)**-year intervals, or any interval that is advantageous to the State. This contract, including any renewals, may not exceed a total of **(insert number)** years. **(State contracts generally may not exceed a total of seven years, IT contracts for 10 years.)**

NOTE TO AGENCIES: Section 2 is optional depending on the project. Contracts in which the term is or will likely be greater than one year should include Section 2 to prevent confusion and to allow for renegotiations to cover new/additional costs to the Contractor.

2. COST ADJUSTMENTS

2.1 Cost Increase by Mutual Agreement. After the contract's initial term and if the State agrees to a renewal, the parties may agree upon a cost increase. The State is not obligated to agree upon a renewal or a cost increase. Any cost increases must be based on demonstrated industry-wide or regional increases in Contractor's costs. Publications such as the Federal Bureau of Labor Statistics and the Consumer Price Index (CPI) for all Urban Consumers may be used to determine the increased value. .

OR

2.1 Cost Increase by Fixed Amount. After the contract's initial term and if the State agrees to a renewal, the parties may agree upon a cost increase of **(insert %)**%, not to exceed **(insert %)**%. Contractor shall request the increase and shall provide justification for the increase. The State is not obligated to agree upon a renewal or a cost increase. .

OR

2.1 Cost Adjustments per Increase in CPI. After the contract's initial term and if the State agrees to a renewal, the parties may agree upon annual pricing adjustments during a renewal based on the cost of living as reflected in the Federal Bureau of Labor Statistics, Consumer Price Index (CPI) for all Urban Consumers (see <http://www.bls.gov/cpi/> for reference) or any other index that may be substituted in the future. The CPI for the last 12-month period of the contract shall be the CPI base on which later adjustments are computed, and the original CPI base shall be the index announced for the month in which the contract was signed. The allowable percentage change shall be calculated as follows:

$$\frac{\text{New CPI Base} - \text{Original CPI Base}}{\text{Original CPI Base}}$$

The original contract costs shall be adjusted according to this percentage change. Each time an adjustment is made, the original CPI base shall be replaced by the adjusted CPI base. The percentage of adjustment to contract prices

shall in no event exceed the percentage change in the index. The State is not obligated to agree upon a renewal or a cost increase.

OR

2.1 Cost Adjustments Negotiated Based on Changes in Contractor's Costs. *After the contract's initial term and if the State agrees to a renewal*, the parties may negotiate cost adjustments at the time of contract renewal. Any cost increases must be based on demonstrated industrywide or regional increases in Contractor's costs. The State is not obligated to agree upon a renewal or a cost increase.

3. SERVICES AND/OR SUPPLIES

Contractor shall provide the State the following **(insert a detailed description of the supplies, services, etc., to be provided to correspond to the requirements specified in the Scope of Project as listed in the solicitation).**

NOTE TO AGENCIES: Section 4 should be tailored to the type of contract being sought.

4. WARRANTIES

NOTE: The following two options are applicable to NON-IT CONTRACTS ONLY.

4.1 Warranty of Products. Contractor warrants that the products supplied conform to the specifications requested, are fit and sufficient for the purpose manufactured, are of good material and workmanship, and are free from defect for a period of **(insert number of days)** from the date of shipment. The length of warranty may vary by product. Contractor further warrants that the products are new and unused and of the latest model or manufacture, unless the State specifies otherwise. Contractor acknowledges that exceptions will be rejected.

AND/OR

4.2 Warranty of Services. Contractor warrants that the services provided conform to the contract requirements, including all descriptions, specifications and attachments made a part of this contract. The State's acceptance of services provided by Contractor shall not relieve Contractor from its obligations under this warranty. In addition to its other remedies under this contract, at law, or in equity, the State may, at Contractor's expense, require prompt correction of any services failing to meet Contractor's warranty herein. Services corrected by Contractor shall be subject to all the provisions of this contract in the manner and to the same extent as services originally furnished.

NOTE: The following options are for IT CONTRACTS ONLY.

4.1 Warranties For Services. The contractor warrants that it performs all services using reasonable care and skill and according to its current description (including any completion criteria) contained in this contract. State agrees to provide timely written notice of any failure to comply with this warranty so that the contractor can take corrective action.

AND/OR

NOTE: Depending on whether you are purchasing custom software or COTS, choose the applicable phrase.

4.2 Warranties for Software. Upon initial installation of the software.

OR

4.2 Warranties for Software. For a period of ninety (90) days from the date of receipt of software, the contractor warrants that: (i) the unmodified software will provide the features and functions, and will otherwise conform to all published documentation including on the contractor's website; and (ii) the media upon which the software is furnished will be free from defects in materials and workmanship under normal use and service.

OR

4.2 Warranties for Hardware. The contractor warrants that hardware provided is free from defects in materials and workmanship and conforms to the specifications. The warranty period for provided hardware is a fixed period commencing on the date specified in a statement of work or applicable contract. If the hardware does not function as warranted during the warranty period and the contractor is unable to either: i) make it do so; or ii) replace it with one that is at least functionally equivalent, State may return it to the contractor for a full refund.

NOTE: All IT contracts must include the following two clauses.

The parties agree that the warranties set forth above do not require uninterrupted or error-free operation of hardware or services unless otherwise stated in the specifications.

These warranties are the state's exclusive warranties and replace all other warranties or conditions, express or implied, including, but not limited to, the implied warranties or conditions of merchantability and fitness for a particular purpose.

5. CONSIDERATION/PAYMENT

5.1 Payment Schedule. In consideration of the **(insert supplies or services)** to be provided, the State shall pay Contractor according to the following schedule: **(insert pay schedule)**.

NOTE TO AGENCIES: Section 5.2 has two options: the first option is a general clause and should be included in all non-IT contracts; the second option is an IT-specific clause and should be included in all IT contracts.

5.2 Withholding of Payment. In addition to its other remedies under this contract, at law, or in equity, the State may withhold payments to Contractor if Contractor has breached this contract. Such withholding may not be greater than, in the aggregate, **(insert %)**% of the total value of the subject statement of work or applicable contract.

OR

5.2 Withholding of Payment. The State may withhold disputed payments to Contractor under the subject statement of work (or where no statement of work exists, the applicable contract). The withholding may not be greater than, in the aggregate, fifteen percent (15%) of the total value of the subject statement of work or applicable contract. With respect to payments subject to milestone acceptance criteria, the State may withhold payment only for such specific milestone if and until the subject milestone criteria are met. Contractor is not relieved of its performance obligation if such payment(s) is withheld.

5.3 Payment Terms. Unless otherwise noted in the solicitation document, the State has 30 days to pay invoices, as allowed by 17-8-242, MCA. Contractor shall provide banking information at the time of contract execution in order to facilitate the State's electronic funds transfer payments.

5.4 Reference to Contract. The contract number MUST appear on all invoices, packing lists, packages, and correspondence pertaining to the contract. If the number is not provided, the State is not obligated to pay the invoice.

NOTE TO AGENCIES: Section 5.5 is optional depending on the project.

5.5 Fuel Surcharge. If, during the contract period, the price of fuel increases 20% over the price of fuel in effect at the time Contractor submitted its bid, Contractor may add a fuel surcharge to the billing invoice. The fuel surcharge will be calculated based on the U.S. Energy Information Administration's (EIA) index for fuel prices in the Rocky Mountain area. This information may be found at <http://www.eia.gov/petroleum/gasdiesel/>. The fuel surcharge adjustment will be factored on a Base Price of **(insert fuel price listed with the EIA for the week the**

bid was submitted). The surcharge is for actual miles driven. Vehicle mileage allowance is **(insert fuel economy of vehicle)** miles per gallon of fuel. The formula for determining the surcharge is:

$$\frac{\text{Number of Miles} \times (\text{Weekly Price} - \text{Base Price})}{\text{(insert fuel economy of vehicle) miles per gallon}}$$

The State may in its sole discretion audit invoices, and Contractor shall promptly provide information as requested to verify mileage. If the price of fuel returns to or below the price as set in Contractor's original bid, the surcharge shall be eliminated.

NOTE TO AGENCIES: Section 6 is to be used as needed depending on the project. Call SPB for assistance at (406) 444-2575.

6. PREVAILING WAGE REQUIREMENTS

6.1 Montana Resident Preference. The nature of the work performed, or services provided, under this contract meets the statutory definition of a "public works contract" in 18-2-401, MCA. Unless superseded by federal law, Montana law requires that contractors and subcontractors give preference to the employment of Montana residents for any public works contract in excess of \$25,000 for construction or nonconstruction services in accordance with 18-2-401 through 18-2-432, MCA, and all administrative rules adopted under these statutes.

Unless superseded by federal law, Contractor shall ensure that at least 50% of the workers performing labor on this project are bona fide Montana residents.

The Commissioner of the Montana Department of Labor and Industry has established the resident requirements in accordance with 18-2-403 and 18-2-409, MCA. Any and all questions concerning prevailing wage and Montana resident issues should be directed to the Montana Department of Labor and Industry.

6.2 Standard Prevailing Rate of Wages. In addition, unless superseded by federal law, all employees working on a public works contract must be paid prevailing wage rates in accordance with 18-2-401 through 18-2-432, MCA, and all associated administrative rules. Montana law requires that all public works contracts, as defined in 18-2-401, MCA, in which the total cost of the contract is greater than \$25,000, contain a provision stating for each job classification the standard prevailing wage rate, including fringe benefits, travel, per diem, and zone pay that the contractors, subcontractors, and employers shall pay during the public works contract. **NOTE TO AGENCIES: Per 18-2-417, MCA, any public works contract that has a potential term of 30 months or more to perform must include one of the following provisions. The applicability of the 3% adjustment varies according to the situation. For more information, see "Applying Prevailing Wages for Contracts Issued Under the Montana Procurement Act" at: <http://gsd.mt.gov/content/Docs/PrevailingWagesQAs.pdf> or call the Labor Standards Bureau Wage and Hour Unit at (406) 444-5600 to speak to a Prevailing Wage Compliance Specialist.**

For a public works contract with an *initial* term of 30 months or longer, insert the following:

The standard prevailing rate of wages paid to workers under this contract must be adjusted 12 months after the date of the award of the public works contract per 18-2-417, MCA. The amount of the adjustment must be a 3% increase. The adjustment must be made and applied every 12 months for the term of the contract. This adjustment is the sole responsibility of Contractor and no cost adjustment in this contract will be allowed to fulfill this requirement.

For a public works contract with an *initial* term of 12 months with one-year renewals, insert the following:

Because this contract has an initial term of 12 months with optional renewals, this contract is subject to the 3% adjustment when the contract length becomes more than 30 months. The 3% rate increase becomes effective upon the second renewal, and the 3% is paid starting in the third year of the contract beginning with the 25th month. The adjustment must be made and applied every 12 months for the term of the contract. This adjustment is the sole responsibility of Contractor and no cost adjustment in this contract will be allowed to fulfill this requirement.

6.3 Notice of Wages and Benefits. Furthermore, 18-2-406, MCA, requires that all contractors, subcontractors, and employers who are performing work or providing services under a public works contract post in a prominent and accessible site on the project staging area or work area, no later than the first day of work and continuing for the entire duration of the contract, a legible statement of all wages and fringe benefits to be paid to the employees in compliance with 18-2-423, MCA.

6.4 Wage Rates, Pay Schedule, and Records. 18-2-423, MCA, requires that employees receiving an hourly wage must be paid on a weekly basis. Each contractor, subcontractor, and employer shall maintain payroll records in a manner readily capable of being certified for submission under 18-2-423, MCA, for not less than three years after the contractor's, subcontractor's, or employer's completion of work on the public works contract. **Note to agencies:** **If this contract is to be performed in more than one district, the highest rate for the craft, classification, or type of worker must be included in the bid specifications and contract provision per ARM 24.17.144. In this case, complete and include the following statement.** The Commissioner of the Montana Department of Labor and Industry has established the standard prevailing rate of wages in accordance with 18-2-401 and 18-2-402, MCA, for _____ to be \$_____ per hour, plus a benefit rate of \$_____.

OR

If more than one craft, classification, or type of worker is included in the contract, use the following statement instead.

All contractors and employers shall classify each employee who performs labor on a public works project according to the applicable standard prevailing rate of wages for such craft, classification, or type of employee established by the Commissioner of the Montana Department of Labor and Industry, and shall pay each such employee a rate of wages not less than the standard prevailing rate as specified in the Montana Prevailing Wages Rates for **(insert type of service) (insert year)**.

NOTE TO AGENCIES: **An appropriate wage rate booklet is attached to the original solicitation, and as such, is part of the contract.**

7. ACCESS AND RETENTION OF RECORDS

7.1 Access to Records. Contractor shall provide the State, Legislative Auditor, or their authorized agents access to any records necessary to determine contract compliance. The State may terminate this contract under section 22, without incurring liability, for the Contractor's refusal to allow access as required by this section. (18-1-118, MCA.)

7.2 Retention Period. Contractor shall create and retain all records supporting the **(insert services rendered or supplies provided)** for a period of eight years after either the completion date of this contract or termination of the contract.

8. ASSIGNMENT, TRANSFER, AND SUBCONTRACTING

Contractor may not assign, transfer, or subcontract any portion of this contract without the State's prior written consent. (18-4-141, MCA.) Contractor is responsible to the State for the acts and omissions of all subcontractors or agents and of persons directly or indirectly employed by such subcontractors, and for the acts and omissions of persons employed directly by Contractor. No contractual relationships exist between any subcontractor and the State under this contract.

NOTE TO AGENCIES: **Section 9 has two options: the first option is applicable to most contracts, and must be included when the second option does not apply; the second option is applicable only to architecture, engineering, and environmental service contracts.**

9. HOLD HARMLESS/INDEMNIFICATION

Contractor agrees to protect, defend, and save the State, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, causes of action of any kind or character, including the cost of defense thereof, arising in favor of Contractor's employees or third parties on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of Contractor and/or its agents, employees, representatives, assigns, subcontractors, except the sole negligence of the State, under this agreement.

OR

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the State, its elected and appointed officials, officers, agents, directors, and employees from and against all claims, damages, losses and expenses, including the cost of defense thereof, to the extent caused by or arising out of Contractor's negligent acts, errors, or omissions in work or services performed under this Contract, including but not limited to, the negligent acts, errors, or omissions of any Subcontractor or anyone directly or indirectly employed by any Subcontractor for whose acts Subcontractor may be liable.

NOTE TO AGENCIES: Section 10 is applicable only to IT contracts.

10. LIMITATION OF LIABILITY

Contractor's liability for contract damages is limited to direct damages and further to no more than twice the contract amount. Contractor shall not be liable for special, incidental, consequential, punitive, or indirect damages. Damages caused by injury to persons or tangible property, or related to intellectual property indemnification, are not subject to a cap on the amount of damages.

NOTE TO AGENCIES: Section 11 needs to be tailored to the project. Call SPB for assistance at (406) 444-2575.

11. REQUIRED INSURANCE

(Insert for commercial general liability and automobile liability only)

11.1 General Requirements. Contractor shall maintain for the duration of this contract, at its cost and expense, insurance against claims for injuries to persons or damages to property, including contractual liability, which may arise from or in connection with the performance of the work by Contractor, agents, employees, representatives, assigns, or subcontractors. This insurance shall cover such claims as may be caused by any negligent act or omission.

(Insert for all insurance types)

11.2 Primary Insurance. Contractor's insurance coverage shall be primary insurance with respect to the State, its officers, officials, employees, and volunteers and shall apply separately to each project or location. Any insurance or self-insurance maintained by the State, its officers, officials, employees, or volunteers shall be excess of Contractor's insurance and shall not contribute with it.

(Insert for commercial general liability only)

11.3 Specific Requirements for Commercial General Liability. Contractor shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of **(insert dollar amount)** per occurrence and **(insert dollar amount)** aggregate per year to cover such claims as may be caused by any act, omission, or negligence of Contractor or its officers, agents, representatives, assigns, or subcontractors. Note: The limits for political subdivisions of the state (i.e. counties, cities, towns, and school districts) are prescribed under §2-9-211, MCA at \$750,000 per claim and \$1,500,000 per occurrence and may not be increased.

The State, its officers, officials, employees, and volunteers are to be covered and listed as additional insureds for liability arising out of activities performed by or on behalf of Contractor, including the insured's general supervision of Contractor, products, and completed operations, and the premises owned, leased, occupied, or used.

(Insert for automobile liability only)

11.4 Specific Requirements for Automobile Liability. Contractor shall purchase and maintain coverage with split limits of \$500,000 per person (personal injury), \$1,000,000 per accident occurrence (personal injury), and \$100,000 per accident occurrence (property damage), OR combined single limits of \$1,000,000 per occurrence to cover such claims as may be caused by any act, omission, or negligence of Contractor or its officers, agents, representatives, assigns, or subcontractors. Note: The limits for political subdivisions of the state (i.e. counties, cities, towns, and school districts) are prescribed under §2-9-211, MCA at \$750,000 per claim and \$1,500,000 per occurrence and may not be increased.

The State, its officers, officials, employees, and volunteers are to be covered and listed as additional insureds for automobiles leased, hired, or borrowed by Contractor.

(Insert for professional liability only)

11.5 Specific Requirements for Professional Liability. Contractor shall purchase and maintain occurrence coverage with combined single limits for each wrongful act of **(insert dollar amount)** per occurrence and **(insert dollar amount)** aggregate per year to cover such claims as may be caused by any act, omission, negligence of Contractor or its officers, agents, representatives, assigns, or subcontractors. Note: The limits for political subdivisions of the state (i.e. counties, cities, towns, and school districts) are prescribed under §2-9-211, MCA at \$750,000 per claim and \$1,500,000 per occurrence and may not be increased. If "occurrence" coverage is unavailable or cost prohibitive, Contractor may provide "claims made" coverage provided the following conditions are met: (1) the commencement date of this contract must not fall outside the effective date of insurance coverage and it will be the retroactive date for insurance coverage in future years; and (2) the claims made policy must have a three-year tail for claims that are made (filed) after the cancellation or expiration date of the policy.

(Insert for all insurance types)

11.6 Deductibles and Self-Insured Retentions. Any deductible or self-insured retention must be declared to and approved by the state agency. At the request of the agency either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the State, its officers, officials, employees, or volunteers; or (2) at the expense of Contractor, Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses. Note: The deductible/self-insured provision does not apply to political subdivisions of the state (i.e. counties, cities, towns, and school districts) under §2-9-211, MCA.

(Insert for all insurance types)

11.7 Certificate of Insurance/Endorsements. A certificate of insurance from an insurer with a Best's rating of no less than A- indicating compliance with the required coverages, has been received by the State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135. Note: Best's ratings do not apply to political subdivisions of the state (i.e. counties, cities, towns, and school districts) under §2-9-211, MCA Contractor must notify the State immediately of any material change in insurance coverage, such as changes in limits, coverages, change in status of policy, etc. The state reserves the right to require complete copies of insurance policies or self-insured memorandums of coverage at all times.

(Optional for financial transactions. Contact the SPB at 444-2575 for more information.)

11.8 Fidelity Bond. Contractor shall purchase and maintain a fidelity bond in the amount of \$1,000,000 per occurrence and \$2,000,000 aggregate that provides coverage for fraud, theft, embezzlement, failure to faithfully perform duties, **burglary and theft of cash by employees or third parties other than employees, forgery/alteration, computer fraud,** and other dishonest acts of any employee, **agent, or independent contractor** whose duties are to receive, handle, or have custody of money, checks, securities, electronic funds, or account for

supplies or other property. The bond must apply to any individual that certifies, signs, or countersigns checks, drafts, warrants, vouchers, orders, electronic documents, or other documents and who provides for the disbursement or delivery (including electronic transmission) of money, funds, securities, supplies, or other property. The fidelity bond must remain in effect for the entire contract period

The contract performance security must be provided to the State of Montana within 10 working days from the Request for Documents Notice.

The fidelity bond must be provided to the following address: State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135.

12. COMPLIANCE WITH WORKERS' COMPENSATION ACT

Contractor shall comply with the provisions of the Montana Workers' Compensation Act while performing work for the State of Montana in accordance with 39-71-401, 39-71-405, and 39-71-417, MCA. Proof of compliance must be in the form of workers' compensation insurance, an independent contractor's exemption, or documentation of corporate officer status. Neither Contractor nor its employees are State employees. This insurance/exemption must be valid for the entire contract term and any renewal. Upon expiration, a renewal document must be sent to the State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135.

13. COMPLIANCE WITH LAWS

NOTE TO AGENCIES: If your project is subject to federal regulations other than those listed here, you may want to include them in this section.

Contractor shall, in performance of work under this contract, fully comply with all applicable federal, state, or local laws, rules, and regulations, including but not limited to, the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Any subletting or subcontracting by Contractor subjects subcontractors to the same provision. In accordance with 49-3-207, MCA, Contractor agrees that the hiring of persons to perform this contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing this contract.

14. DISABILITY ACCOMMODATIONS

The State does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services, or activities. Individuals who need aids, alternative document formats, or services for effective communications or other disability related accommodations in the programs and services offered are invited to make their needs and preferences known to this office. Interested parties should provide as much advance notice as possible.

NOTE TO AGENCIES: Section 15 is optional depending on project.

15. TECHNOLOGY ACCESS FOR BLIND OR VISUALLY IMPAIRED

Contractor acknowledges that no state funds may be expended for the purchase of information technology equipment and software for use by employees, program participants, or members of the public unless it provides blind or visually impaired individuals with access, including interactive use of the equipment and services, that is equivalent to that provided to individuals who are not blind or visually impaired. (18-5-603, MCA.) Contact the State Procurement Bureau at (406) 444-2575 for more information concerning nonvisual access standards.

16. REGISTRATION WITH THE SECRETARY OF STATE

Any business intending to transact business in Montana must register with the Secretary of State. Businesses that

are incorporated in another state or country, but which are conducting activity in Montana, must determine whether they are transacting business in Montana in accordance with 35-1-1026 and 35-8-1001, MCA. Such businesses may want to obtain the guidance of their attorney or accountant to determine whether their activity is considered transacting business.

If businesses determine that they are transacting business in Montana, they must register with the Secretary of State and obtain a certificate of authority to demonstrate that they are in good standing in Montana. To obtain registration materials, call the Office of the Secretary of State at (406) 444-3665, or visit their website at <http://sos.mt.gov>.

NOTE TO AGENCIES: Section 18 is optional depending on project. The option to make ownership exclusive to the State may be considered in certain circumstances. Call SPB for assistance at (406) 444-2575.

17. INTELLECTUAL PROPERTY/OWNERSHIP

17.1 Mutual Use. Contractor shall make available to the State, on a royalty-free, non-exclusive basis, all patent and other legal rights in or to inventions first conceived and reduced to practice, or created in whole or in part under this contract, if such availability is necessary for the State to receive the benefits of this contract. Unless otherwise specified in a statement of work, both parties shall have a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use copyrightable property created under this contract. This mutual right includes (i) all deliverables and other materials, products, modifications that Contractor has developed or prepared for the State under this contract; (ii) any program code, or site- related program code that Contractor has created, developed, or prepared under or primarily in support of the performance of its specific obligations under this contract; and (iii) manuals, training materials, and documentation. All information described in (i), (ii), and (iii) is collectively called the "Work Product".

17.2 Title and Ownership Rights. The State retains title to and all ownership rights in all data and content, including but not limited to multimedia or images (graphics, audio, and video), text, and the like provided by the State (the "Content"), but grants Contractor the right to access and use Content for the purpose of complying with its obligations under this contract and any applicable statement of work.

17.3 Ownership of Work Product. Contractor shall execute any documents or take any other actions as may reasonably be necessary, or as the State may reasonably request, to perfect the State's ownership of any Work Product.

17.4 Copy of Work Product. Contractor shall, at no cost to the State, deliver to the State, upon the State's request during the term of this contract or at its expiration or termination, a current copy of all Work Product in the form and on the media in use as of the date of the State's request, or such expiration or termination.

17.5 Ownership of Contractor Pre-Existing Materials. Contractor retains ownership of all literary or other works of authorship (such as software programs and code, documentation, reports, and similar works), information, data, intellectual property, techniques, subroutines, algorithms, methods or related rights and derivatives that Contractor owns at the time this contract is executed or otherwise developed or acquired independent of this contract and employed by Contractor in connection with the services provided to the State (the "Contractor Pre-existing Materials"). Contractor Pre-existing Materials are not Work Product. Contractor shall provide full disclosure of any Contractor Pre-Existing Materials to the State before its use and to prove its ownership. If, however, Contractor fails to disclose to the State such Contractor Pre-Existing Materials, Contractor shall grant the State a nonexclusive, worldwide, paid-up license to use any Contractor Pre-Existing Materials embedded in the Work Product to the extent such Contractor Pre-Existing Materials are necessary for the State to receive the intended benefit under this contract. Such license shall remain in effect for so long as such Pre-Existing Materials remain embedded in the Work Product. Except as otherwise provided for in **Section 17.3** or as may be expressly agreed in any statement of work, Contractor shall retain title to and ownership of any hardware it provides under this contract.

NOTE TO AGENCIES: Section 18 is optional depending on project.

18. PATENT AND COPYRIGHT PROTECTION

18.1 Third-Party Claim. If a third party makes a claim against the State that the products furnished under this contract infringe upon or violate any patent or copyright, the State shall promptly notify Contractor. Contractor shall defend such claim in the State's name or its own name, as appropriate, but at Contractor's expense. Contractor shall indemnify the State against all costs, damages, attorney fees, and all other costs and expenses of litigation that accrue as a result of such claim. If the State reasonably concludes that its interests are not being properly protected, or if principles of governmental or public law are involved, it may enter any action.

18.2 Product Subject of Claim. If any product furnished is likely to or does become the subject of a claim of infringement of a patent or copyright, then Contractor may, at its option, procure for the State the right to continue using the alleged infringing product, or modify the product so that it becomes non-infringing. If none of the above options can be accomplished, or if the use of such product by the State shall be prevented by injunction, the State will determine whether the contract has been breached.

NOTE TO AGENCIES: Section 19 is optional and if used must be tailored to the specific procurement. The following sample clauses are provided for consideration. Call SPB for assistance at (406) 444-2575.

19. CONTRACT PERFORMANCE ASSURANCE

NOTE TO AGENCIES: An escrow agreement may be beneficial for some IT projects. Call SPB for assistance at (406) 444-2575.

19.1 Milestone Payments. The State shall pay Contractor based on completion and acceptance of each milestone defined below.

19.2 Payment Holdbacks. (insert %)% will be withheld from each milestone payment. The total amount withheld will be paid to Contractor at the completion and acceptance of the final milestone.

Milestone/Deliverable	Hold Back	Payment % of Total
Milestone 1:	___% of approved invoice	%
Milestone 2:		%
Milestone 3:	___% of approved invoice	%
Milestone 4:	___% of approved invoice	%
Milestone 5:	___% of approved invoice	%
Final Acceptance		100%

NOTE TO AGENCIES: Contract performance security may be used as a performance assurance tool. If used, an agency may choose to accept all forms of security or limit the security to surety bonds only. Call SPB for assistance at (406) 444-2575.

19.3 Contract Performance Security – All Forms Accepted. Contractor shall provide contract performance security based upon (insert %)% of the contract total.

Contractor shall provide the contract performance security in one of the following forms, within 10 working days from the Request for Documents Notice. ONLY THE FOLLOWING TYPES OF SECURITY ARE

ACCEPTABLE AND MUST BE IN ORIGINAL FORM. FACSIMILE, ELECTRONIC, OR PHOTOCOPIES ARE NOT ACCEPTABLE. Personal or business checks are not acceptable.

- A sufficient bond from a surety company licensed in Montana with a Best's rating of no less than A- and supplied on the State of Montana's designated form entitled "Contract Performance Bond," found at <http://svc.mt.gov/gsd/OneStop/GSDDocuments.aspx>; or
- Lawful money of the United States; or
- An irrevocable letter of credit from a single financial institution and supplied on the State of Montana's designated form entitled "Irrevocable Letter of Credit," found at <http://svc.mt.gov/gsd/OneStop/GSDDocuments.aspx>; or
- A cashier's check, certified check, bank money order, bank draft, certificate of deposit, or money market certificate drawn or issued by a federally or state-chartered bank or savings and loan association that is insured by, or for which insurance is administered by the FDIC, or that is drawn and issued by a credit union insured by the National Credit Union Share Insurance Fund. Certificates of deposit or money market certificates will not be accepted as security for bid, proposal, or contract security unless the certificates are assigned only to the State. All interest income from these certificates must accrue only to Contractor and not the State.

See Title 18, chapter 4, part 3, MCA; Title 30, chapter 5, MCA; and ARM 2.5.502.

This contract performance security must remain in effect for the entire term of this contract. A new surety bond or irrevocable letter of credit must be issued to the State of Montana if this contract is renewed.

The contract performance security in the form of a **(insert form)** has been provided to the following address: State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135.

OR

19.3 Contract Performance Security – Surety Bonds Only. Contractor shall provide contract performance security based upon 100% of the contract total. This security must be in the form of a surety bond licensed in Montana with a Best's rating of no less than A-. The surety bond must be supplied on the form designated by the State of Montana. The required form entitled "Contract Performance Bond" is available at <http://svc.mt.gov/gsd/OneStop/GSDDocuments.aspx>. **THE ORIGINAL FORM MUST BE PROVIDED. FACSIMILE, ELECTRONIC, OR PHOTOCOPIES ARE NOT ACCEPTABLE.**

The contract performance security must be provided to the State of Montana within 10 working days from the Request for Documents Notice. This security must remain in effect for the entire term of the contract. A new surety bond must be issued to the State of Montana if this contract is renewed.

The original surety bond form has been provided to the following address: State Procurement Bureau, P.O. Box 200135, Helena, MT 59620-0135.

NOTE TO AGENCIES: Section 20 is applicable only to IT contracts.

20. CONTRACT OVERSIGHT

20.1 CIO Oversight. The Chief Information Officer (CIO) for the State of Montana, or designee, may perform contract oversight activities. Such activities may include the identification, analysis, resolution, and prevention of deficiencies that may occur within the performance of contract obligations. The CIO may require the issuance of a right to assurance or may issue a stop work order.

20.2 Right to Assurance. If the State, in good faith, has reason to believe that Contractor does not intend

to, is unable to, or has refused to perform or continue performing all material obligations under this contract, the State may demand in writing that Contractor give a written assurance of intent to perform. Contractor's failure to provide written assurance within the number of days specified in the demand (in no event less than five business days may, at the State's option, be the basis for terminating this contract and pursuing the rights and remedies available under this contract or law.

20.3 Stop Work Order. The State may, at any time, by written order to Contractor require Contractor to stop any or all parts of the work required by this contract for the period of days indicated by the State after the order is delivered to Contractor. The order must be specifically identified as a stop work order issued under this clause. Upon receipt of the order, Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. If a stop work order issued under this clause is canceled or the period of the order or any extension expires, Contractor shall resume work. The State Project Manager shall make the necessary adjustment in the delivery schedule or contract price, or both, and this contract shall be amended in writing accordingly.

21. CONTRACT TERMINATION

NOTE TO AGENCIES: The following three termination provisions are presented as options for Section 21.1. In deciding which provision to use, consideration should be given to the circumstances of each individual contract. In any case, all agencies must maintain documentation regarding why a contract is terminated or not renewed.

21.1 Termination for Cause. The State may, by written notice to Contractor, immediately terminate this contract in whole or in part for Contractor's failure to materially perform any of the services, duties, terms or conditions contained in this contract.

OR

21.1 Termination for Cause with Notice to Cure Requirement. The State may terminate this contract in whole or in part for Contractor's failure to materially perform any of the services, duties, terms, or conditions contained in this contract after giving Contractor written notice of the stated failure. The written notice must demand performance of the stated failure within a specified period of time of not less than **(insert number of days)**. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period. .

OR

21.1 Termination for Convenience. The State may, by written notice to Contractor, terminate this contract without cause and without incurring liability to Contractor. The State shall give notice of termination to Contractor at least **(insert numbers of days)** days before the effective date of termination. The State shall pay Contractor only that amount, or prorated portion thereof, owed to Contractor up to the date the State's termination takes effect. This is Contractor's sole remedy. The State shall not be liable to Contractor for any other payments or damages arising from termination under this section, including but not limited to general, special, or consequential damages such as lost profits or revenues.

21.2 Termination for Cause with Notice to Cure Requirement. Contractor may terminate this contract for the State's failure to perform any of its duties under this contract after giving the State written notice of the failure. The written notice must demand performance of the stated failure within a specified period of time of not less than **(insert number of days)**. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period.

21.3 Reduction of Funding. The State must by law terminate this contract if funds are not appropriated or otherwise made available to support the State's continuation of performance of this contract in a subsequent fiscal period. (18-4-313(4), MCA.) If state or federal government funds are not appropriated or otherwise made

available through the state budgeting process to support continued performance of this contract (whether at an initial contract payment level or any contract increases to that initial level) in subsequent fiscal periods, the State shall terminate this contract as required by law. The State shall provide Contractor the date the State's termination shall take effect. The State shall not be liable to Contractor for any payment that would have been payable had the contract not been terminated under this provision. As stated above, the State shall be liable to Contractor only for the payment, or prorated portion of that payment, owed to Contractor up to the date the State's termination takes effect. This is Contractor's sole remedy. The State shall not be liable to Contractor for any other payments or damages arising from termination under this section, including but not limited to general, special, or consequential damages such as lost profits or revenues.

NOTE TO AGENCIES: Section 21.4 is applicable only to IT contracts.

21.4 Noncompliance with Department of Administration Requirements. The Department of Administration, under the provisions of 2-17-514, MCA, retains the right to cancel or modify any contract, project, or activity that is not in compliance with the Department's Plan for Information Technology, the State Strategic Plan for Information Technology, or any Statewide IT policy or standard in effect as of the date of contract execution. In the event of such termination, the State will pay for products and services delivered to date and any applicable termination fee specified in the statement of work or work order. Any modifications to this contract must be mutually agreed to by the parties.

22. EVENT OF BREACH – REMEDIES

22.1 Event of Breach by Contractor. Any one or more of the following Contractor acts or omissions constitute an event of material breach under this contract:

- products or services furnished fail to conform to any requirement;
- failure to submit any report required by this contract;
- failure to perform any of the other terms and conditions of this contract, including but not limited to beginning work under this contract without prior State approval and breaching Section 28.1 obligations; or
- voluntary or involuntary bankruptcy or receivership.

22.2 Event of Breach by State. The State's failure to perform any material terms or conditions of this contract constitutes an event of breach.

22.3 Actions in Event of Breach.

Upon the Contractor's material breach, the State may:

- terminate this contract under section 22; or
- treat this contract as materially breached and pursue any of its remedies under this contract, at law, or in equity.

Upon the State's material breach, the Contractor may:

- terminate this contract after giving the State written notice of the stated failure. The written notice must demand performance of the stated failure within a specified period of time of not less than **(insert number of days)**. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period; or
- treat this contract as materially breached and, except as the remedy is limited in this contract, pursue any of its remedies under this contract, at law or in equity.

23. FORCE MAJEURE

Neither party is responsible for failure to fulfill its obligations due to causes beyond its reasonable control,

including without limitation, acts or omissions of government or military authority, acts of God, materials shortages, transportation delays, fires, floods, labor disturbances, riots, wars, terrorist acts, or any other causes, directly or indirectly beyond the reasonable control of the nonperforming party, so long as such party uses its best efforts to remedy such failure or delays. A party affected by a force majeure condition shall provide written notice to the other party within a reasonable time of the onset of the condition. In no event, however, shall the notice be provided later than 5 working days after the onset. If the notice is not provided within the 5 day period, then a party may not claim a force majeure event. A force majeure condition suspends a party's obligations under this contract, unless the parties mutually agree that the obligation is excused because of the condition.

24. WAIVER OF BREACH

Either party's failure to enforce any contract provisions after any event of breach is not a waiver of its right to enforce the provisions and exercise appropriate remedies if the breach occurs again. Neither party may assert the defense of waiver in these situations.

25. CONFORMANCE WITH CONTRACT

No alteration of the terms, conditions, delivery, price, quality, quantities, or specifications of the contract shall be granted without the State Procurement Bureau's prior written consent. Product or services provided that do not conform to the contract terms, conditions, and specifications may be rejected and returned at Contractor's expense.

26. LIAISONS AND SERVICE OF NOTICES

NOTE TO AGENCIES: The following two provisions are presented as options for Section 26.1. In deciding which provision to use, consideration should be given to the circumstances of each individual contract. The second option is generally applicable to IT contracts under the Montana Information Technology Act.

26.1 Contract Liaisons. All project management and coordination on the State's behalf must be through a single point of contact designated as the State's liaison. Contractor shall designate a liaison that will provide the single point of contact for management and coordination of Contractor's work. All work performed under this contract must be coordinated between the State's liaison and Contractor's liaison.

_____ is the State's liaison.

(Address):

(City, State, ZIP):

Telephone:

Cell Phone:

Fax:

E-mail:

_____ is Contractor's liaison.

(Address):

(City, State, ZIP):

Telephone:

Cell Phone:

Fax:

E-mail:

OR

26.1 Contract Manager. The State Contract Manager identified below is the State's single point of contact and shall perform all contract management under 2-17-512, MCA, on the State's behalf. Written notices, requests, complaints, or any other issues regarding this contract should be directed to the State Contract Manager.

_____ is the State's Contract Manager.

(Address):

(City, State, ZIP):

Telephone:

Cell Phone:

Fax:

E-mail:

_____ is Contractor's Contract Manager.

(Address):

(City, State, ZIP):

Telephone:

Cell Phone:

Fax:

E-mail:

26.2 Notifications. The State's liaison and Contractor's liaison may be changed by written notice to the other party. Written notices, requests, or complaints must first be directed to the liaison. Notice may be provided by personal service, mail, or facsimile. If notice is provided by personal service or facsimile, the notice is effective upon receipt; if notice is provided by mail, the notice is effective within three (3) business days of mailing. A signed and dated acknowledgement of the notice is required of both parties.

NOTE TO AGENCIES: Section 26.3 is optional depending on project.

26.3 Identification/Substitution of Personnel. The personnel identified or described in Contractor's proposal shall perform the services provided for the State under this contract. Contractor agrees that any personnel substituted during the term of this contract must be able to conduct the required work to industry standards and be equally or better qualified than the personnel originally assigned. The State reserves the right to approve Contractor personnel assigned to work under this contract and any changes or substitutions to such personnel. The State's approval of a substitution will not be unreasonably withheld. This approval or disapproval shall not relieve Contractor to perform and be responsible for its obligations under this contract. The State reserves the right to require Contractor personnel replacement. If Contractor personnel become unavailable, Contractor shall provide an equally qualified replacement in time to avoid delays to the work plan.

27. MEETINGS

27.1 Technical or Contractual Problems. Contractor shall meet with the State's personnel, or designated representatives, to resolve technical or contractual problems occurring during the contract term or to discuss the progress made by Contractor and the State in the performance of their respective obligations, at no additional cost to the State. The State may request the meetings as problems arise and will be coordinated by the State. The State shall provide Contractor a minimum of three full working days notice of meeting date, time, and location. Face-to-face meetings are desired; however, at Contractor's option and expense, a conference call meeting may be substituted. Contractor's consistent failure to participate in problem resolution meetings, Contractor missing or rescheduling two consecutive meetings, or Contractor's failure to make a good faith effort to resolve problems may result in termination of the contract.

NOTE TO AGENCIES: Sections 27.2-27.4 are optional based on project.

27.2 Progress Meetings. During the term of this contract, the State's Project Manager shall plan and schedule progress meetings with Contractor to discuss Contractor's and the State's progress in the performance of their respective obligations. These progress meetings will include the State Project Manager, the Contractor Project Manager, and any other additional personnel involved in the performance of this contract as required. At each meeting, Contractor shall provide the State with a written status report that identifies any problem or circumstance encountered by Contractor, or of which Contractor gained knowledge during the period since the last such status report, which may prevent Contractor from completing any of its obligations or may generate charges in excess of

those previously agreed to by the parties. This may include the failure or inadequacy of the State to perform its obligation under this contract. Contractor shall identify the amount of excess charges, if any, and the cause of any identified problem or circumstance and the steps taken to remedy the same.

27.3 Failure to Notify. If Contractor fails to specify in writing any problem or circumstance that materially affects the costs of its delivery of services or products, including a material breach by the State, about which Contractor knew or reasonably should have known with respect to the period during the term covered by Contractor's status report, Contractor shall not be entitled to rely upon such problem or circumstance as a purported justification for an increase in the price for the agreed upon scope; ~~provided, however, that Contractor shall be relieved of its performance obligations, excluding Contractor's notification obligations, to the extent the acts or omissions of the State prevent such performance.~~

27.4 State's Failure or Delay. For a problem or circumstance identified in Contractor's status report in which Contractor claims was the result of the State's failure or delay in discharging any State obligation, the State shall review same and determine if such problem or circumstance was in fact the result of such failure or delay. If the State agrees as to the cause of such problem or circumstance, then the parties shall extend any deadlines or due dates affected thereby, and provide for any additional charges by Contractor. This is Contractor's sole remedy. If the State does not agree as to the cause of such problem or circumstance, the parties shall each attempt to resolve the problem or circumstance in a manner satisfactory to both parties.

28. TRANSITION ASSISTANCE

If this contract is not renewed at the end of this term, if the contract is otherwise terminated before project completion, or if particular work on a project is terminated for any reason, Contractor shall provide transition assistance for a reasonable, mutually agreed period of time after the expiration or termination of this contract or particular work under this contract. The purpose of this assistance is to allow for the expired or terminated portion of the services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such services to the State or its designees. The parties agree that such transition assistance is governed by the terms and conditions of this contract, except for those terms or conditions that do not reasonably apply to such transition assistance. The State shall pay Contractor for any resources utilized in performing such transition assistance at the most contract current rates. If the State terminates a project or this contract for cause, then the State may offset the cost of paying Contractor for the additional resources Contractor utilized in providing transition assistance with any damages the State may have sustained as a result of Contractor's breach.

29. CHOICE OF LAW AND VENUE

Montana law governs this contract. The parties agree that any litigation concerning this bid, proposal, or this contract must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees. (18-1-401, MCA.)

30. TAX EXEMPTION.

The State of Montana is exempt from Federal Excise Taxes (#81-0302402).

31. AUTHORITY

This contract is issued under authority of Title 18, Montana Code Annotated, and the Administrative Rules of Montana, Title 2, chapter 5.

32. SEVERABILITY CLAUSE

A declaration by any court or any other binding legal source that any provision of the contract is illegal and void shall not affect the legality and enforceability of any other provision of the contract, unless the provisions are

mutually and materially dependent.

33. SCOPE, ENTIRE AGREEMENT, AND AMENDMENT

33.1 Contract. This contract consists of (insert number) numbered pages, any Attachments as required, Solicitation # (insert solicitation number), as amended, and Contractor's response, as amended. In the case of dispute or ambiguity arising between or among the documents, the order of precedence of document interpretation is the same.

33.2 Entire Agreement. These documents are the entire agreement of the parties. They supersede all prior agreements, representations, and understandings. Any amendment or modification must be in a written agreement signed by the parties.

34. WAIVER

The State's waiver of any Contractor obligation or responsibility in a specific situation is not a waiver in a future similar situation or is not a waiver of any other Contractor obligation or responsibility.

35. EXECUTION

The parties through their authorized agents have executed this contract on the dates set out below.

STATE OF MONTANA
(INSERT AGENCY NAME)
(Insert Address)
Insert City, State, Zip)

(INSERT CONTRACTOR'S NAME)
(Insert Address)
(Insert City, State, Zip)
FEDERAL ID #

BY: _____
(Name/Title)

BY: _____
(Name/Title)

(Signature)

(Signature)

DATE: _____

DATE: _____

Approved as to Legal Content:

Legal Counsel (Date)

Approved as to Form:

Procurement Officer (Date)
State Procurement Bureau

NOTE TO AGENCIES: The CIO Approval below is applicable to IT Contract only.

Chief Information Officer Approval:

Contractor is notified that, under the provisions of 2-17-514, MCA, the Department of Administration retains the right to cancel or modify any contract, project, or activity that is not in compliance with the Agency's Plan for Information Technology, the State Strategic Plan for Information Technology, or any statewide IT policy or standard.

Chief Information Officer (Date)
Department of Administration